

Constructing Pilot Projects¹

I. Introduction

Before an agency implements ADR on a large scale or permanent basis, it is advisable to start with one or more pilot projects. A pilot project, where ADR is utilized on a limited, experimental basis, is valuable because it allows an agency to begin on a small scale in order to see how well ADR works for their agency or for a particular type of dispute. The agency can learn lessons from the pilot, correct any problems that arise, and then implement ADR on a larger, permanent scale. Or, if ADR turns out not to be appropriate in a dispute area, the agency can make that determination based on its small, temporary pilot.

Many people's first exposure to ADR will be during the pilot. Starting with one or more pilots is a way of creating "success stories" to demonstrate the value of using ADR. Selecting an appropriate pilot and taking steps to ensure its success are critical to initiating a broader ADR program.

For a pilot program to be successful, it is necessary to enlist leadership and support from senior management from the outset. Obtaining such support may require one or more initial training sessions for top level officials, to address questions such as, what is ADR? how have other agencies benefited from ADR? and how can ADR benefit our agency? The degree of organizational support for ADR will vary from situation to situation, and will influence the selection of an appropriate ADR pilot. If there is no broad ADR support from top agency officials, one of the goals of the pilot should be to achieve such broad support, in which case a modest pilot may be advisable. On the other hand, if agency officials are already enthusiastic about ADR, then a more ambitious pilot may be appropriate.

This chapter on constructing pilot projects sets forth the steps recommended for making a successful ADR pilot project. "Macro" issues, such as overcoming resistance, are relevant to pilot project design; however, this chapter does not contain a lengthy discussion of macro issues. Please refer to Part I of the resource manual, for suggestions relating to macro issues.

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II Predesign Issues and Decisions

A. Responsible Individuals

It is essential that one or more individuals are given responsibility for coordinating development of the pilot project. If there is more than one responsible individual, duties can be divided, reducing the workload of any one person. However, divided responsibility may result in a leadership vacuum. Whatever choice is made, the following tasks must be assigned:

- direct, coordinate, and provide expertise to others participating in the pilot project design;
- know the status of the pilot project design at all times (or know how and where to find that out);
- respond to inquiries about the pilot project; and
- handle whatever needs handling if no one else is handling it.

Ideally, the responsible individuals will be from within the agency. Even if the services of an outside design consultant are retained (see below), having someone within the agency who is familiar with all aspects of the pilot will serve the agency in the long run by providing in-house expertise and, consequently, cost savings for future ADR endeavors.

Once the pilot project's focus has been determined, the agency can assess its resource needs for design, and then select individuals who will have sufficient time, skills, and background to handle the task. Some of the criteria that might be considered in selecting responsible individuals include:

- ADR experience and training;
- familiarity with ADR program design;
- familiarity with the agency program that is subject of the pilot project;

- good relations with those inside and outside the agency who will participate in the pilot project; and
- good organizational and management skills.

B. Experience and Expertise

Developing the best possible ADR pilot project will involve taking advantage of available expertise and learning from relevant experience. Finding someone who has conducted a similar pilot project, or retaining the services of an individual or organization specializing in the design of ADR pilot projects or systems, can offer valuable lessons and help the agency avoid unnecessary pitfalls. In addition to drawing from the expertise of outside sources, an agency should develop internal expertise by ensuring that key individuals in the pilot project design receive ADR training. Places to find such expertise and experience include:

- agencies that have utilized ADR;
- Interagency ADR Working Group Section leaders and members;
- Interagency ADR Working Group website;
- agencies/organizations that provide ADR training or services;
- your agency's dispute resolution specialist;
- your agency's training office;
- private ADR consultants; and
- ADR professional organizations and journals.

C. Stakeholders and Feedback

The designers of an ADR pilot project should enlist the active participation of a diverse team of "stakeholders" in the various design stages. The inclusion of affected interest groups in the design of an ADR pilot project can serve a number of goals. It increases the likelihood that all questions critical to the success of the pilot project will be asked. Also, groups that are included in the design process will likely feel some "ownership" of the final product, which in turn

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should reduce potential resistance to the pilot project. Some of the functions a team of stakeholders can serve:

- identify aspects of the existing dispute resolution system that need improvement;
- offer feedback from different perspectives on various facets of the proposed pilot project; prevent tunnel vision;
- provide the benefit of “lessons learned” for the pilot project from the very outset;
- identify possible, probable sources of resistance and institutional or other constraints; and
- market the pilot project to peers.

The stakeholder team should consist of individuals representing all the groups within the agency that may be significantly affected by the pilot project, including individuals who represent interests that may resist it. Additionally, in the early stages, the agency should identify the "stakeholder" groups (e.g., program managers, line officials, Office of General Counsel, Administrative Law Judge, field employees). This information will be important during the design process.

Agency ADR project designers should also consider including stakeholders from outside the agency (e.g., regulated parties, public interest groups) in the pilot project design. Because disputing parties must generally consent to the use of ADR, it is important that outside parties view the ADR pilot project as one in which they would want to participate. Agencies will have to determine whether there are any legal or policy reasons why including non-agency individuals in any aspect or stage of pilot project design is impermissible or unwise.

D. Pilot Project Choices

The agency's needs and objectives will determine the design of an appropriate ADR pilot project. An agency seeking to reduce a backlog of cases that do not involve parties having an ongoing relationship with the agency (e.g., tort claims) has different needs than an agency looking to resolve a few, complicated disputes involving parties that do have an ongoing relationship with the agency (e.g., environmental or employment disputes). Because of these different needs and objectives, many aspects of the pilot's design will differ.

The following checklist provides generic steps for the design of an appropriate pilot project, taking into consideration the broad range of circumstances and disputes that may face an agency considering the use of an ADR pilot project.

1. Clearly Identify Goals

If goals have not been clearly identified, an agency cannot make an informed decision as to where (what type of dispute? which geographical location?) and how (mediation or arbitration? a 3-month or 2-year pilot?) ADR should be piloted. The agency's mission may have a bearing on the goals of a pilot project, and should be considered. Some goals that an agency might have for its pilot project include:

- complying with statutory or regulatory requirements;
- reducing/eliminating case backlog;
- reducing litigation costs;
- making ADR an integral part of the agency's dispute resolution process;
- resolving disputes at the earliest possible stage;
- promoting favorable publicity with constituents, employees, Congress, etc.;
- reducing the number of administrative appeals filed; and
- improving communication between management and employees.

2. Assess Existing Dispute Resolution Systems

An agency should determine the types of disputes it faces, whether those disputes are currently being resolved in an effective manner, and how dispute resolution can be enhanced. Based on the outcome of the assessment, an agency can generate different pilot project options, and then narrow the focus to a category of disputes most appropriate for a pilot project. Specific questions that should be asked at this initial stage include:

- What types of conflicts does the agency commonly experience?
- What are the existing dispute resolution processes for those conflicts?

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- What is the likelihood that the conflicts will eventually settle?
- What problems does the agency see in the existing dispute resolution processes both procedurally and in the substantive results produced?
- If the dispute resolution process has multiple stages, at what stages do problems arise?
- What improvements would the agency like to see in the existing dispute resolution process?
- If those improvements were made, what benefits would be realized?

3. Define a “Successful” Pilot Project

What constitutes a "successful" pilot project will depend upon what is important to the agency (i.e., the agency's goals). Thus, a successful pilot project could be one that saves the agency substantial money in reduced legal fees and expenses, reduces the agency's caseload, improves relations with constituents, or provides good public relations for the agency. Success should be **quantifiable** (e.g., reduction in annual legal expenses of \$300,000, average case resolved 90 days after complaint filed, rather than historic 200 days). However success is defined, it is essential for designers to consider early in the design stage how the pilot project will be **evaluated** to demonstrate pilot project results.

4. Select a Pilot Project that is likely to Succeed

The success of the pilot project in an agency just beginning to experiment with ADR will have a major impact on the future of ADR at the agency. For example, if the primary goal of the pilot project is to reduce legal fees, a successful pilot project might be designed to offer ADR early in the litigation process. Since a majority of lawsuits settle before trial, legal fees can be reduced by resolving cases in the early stages rather than on the courthouse steps. Questions to ask:

- Will there be a sufficient number of disputes to test the pilot project's success?
- Can the success of the pilot project be easily evaluated?
- Are there sufficient resources (staff, money, etc.) to devote to the pilot project?

- Will the pilot project have future "sales potential" to others in the agency?

5. Select a Pilot Project Central to the Agency's Mission

If one of the goals of the pilot project is to make ADR an integral part of the agency's dispute resolution processes, the agency should choose a pilot project that is central to its mission. An ADR pilot project that is central to the agency's mission will have greater sales potential to a wider audience at the agency because it touches issues and disputes familiar to others throughout the agency. On the other hand, there may also be reasons for selecting a pilot project that is **not** central to the agency's mission. For example, a category of disputes not directly related to the agency's mission may be so troublesome to an agency (e.g., EEO complaints) that an ADR pilot in that area is desirable.

6. Select Appropriate ADR Method

Designing an ADR pilot project requires more than just deciding on the types of disputes to be addressed. The type of ADR to be used in resolving those disputes must also be decided. The emphasis in the ADR field is on appropriate dispute resolution: utilizing an appropriate method of dispute resolution for different types of disputes.

It is important to recognize that some ADR methods may be more appropriate than others for resolving certain types of disputes. For example, a conflict involving the determination of facts, value, or other semi-objective criteria may best be served by using early neutral evaluation. Parties may then choose to continue negotiating or use the services of a mediator or other ADR process.

When deciding which type of ADR process to choose, it may be useful to begin with a mediation model. There are potential advantages to starting with a mediation pilot project: mediation is useful in achieving early resolution, and can be less expensive than more formal ADR proceedings such as arbitration; mediation focuses on the parties interests, rather than who was right and who was wrong, so "win-win" results can be achieved; and mediation often improves communication skills which can be very helpful where the agency and the private party have an ongoing relationship.

7. Examine Relevant Statutes and Regulations

Before designing a pilot project, the designers should be sure to examine any relevant statutes and regulations to determine whether there are any legal impediments to the proposed pilot project. Consultation with the agency's General Counsel's office is advised.

III. Designing the Pilot Project

Once the pilot project has been selected, the design phase of the project can begin. The pilot project design will need to address a number of questions based on the agency's goals. The design should address the following questions:

- Will all appropriate cases be included in the pilot project?
- If all cases will not be included, how will cases be selected?
- Who will be responsible for selecting the cases?
- Will the ADR process be mandatory or voluntary?
- Who will be the mediators?
- How will the mediators be selected and paid?
- Will training be required for the mediators?
- If mediator training is required, who will develop and provide it?
- Will training be offered to disputants?
- If disputant training is offered, who will develop and provide it?
- Who will be responsible for developing the necessary forms and evaluation tools?
- Who will be responsible for administering the program (scheduling the mediations, making the administrative arrangements, etc.)?
- Who will be responsible for collecting, maintaining and reporting on the evaluation data?

Here are some guidelines for the pilot project design phase:

A. Do not Reinvent the Wheel

Even if your agency's pilot project is the first of its kind, there is no need to start from scratch. Seek assistance from those who have designed ADR pilot projects or systems before. Also, to the extent possible, link the pilot project to the existing dispute resolution system, rather than creating an entirely new system. A pilot project

that does not introduce radical changes to the existing system may meet less resistance than one that is perceived to be an overhaul. Moreover, disputants may be more inclined to participate in a pilot project that does not seem overly complex.

B. Offer ADR Early

ADR can be offered at many stages of a dispute. In general, the earlier ADR is offered in the life of a dispute, the more likely it is that the dispute will be resolved. This is true since parties' positions tend to harden the longer a dispute persists. Choosing the stage at which to offer ADR will depend in part on where the existing dispute resolution system is breaking down.

For example, an agency may have a three-level appeals process for existing disputes. The main goal for the pilot project is to reduce the number of cases reaching the second and third levels. If only a small number of cases are currently being resolved at the first level, an agency would want to consider offering ADR prior to or during the first level. On the other hand, if there is an existing backlog of appeals that have already reached the third-level appeal, offering ADR at the first level will probably be ineffective in remedying these cases, although it will eventually lead to a reduced backlog as cases are settled earlier.

C. Case Selection

The agency should develop criteria for selecting specific cases for the pilot project. Some criteria might be:

- the amount in dispute (e.g., cases over \$500,000);
- particular categories of disputes (e.g. all EEO cases);
- cases filed before a certain date; and
- cases in a particular geographic region.

When considering case selection, agencies should refer to the Administrative Dispute Resolution Act of 1996. The Act lists a number of factors that may make a case **inappropriate** for ADR, such as an agency's need for an authoritative decision for precedential value, or the fact that the dispute presents significant questions of government policy.

D. Evaluation

Data must be collected, collated, analyzed, and reported in order to determine whether the pilot project program is successful in meeting its goals. How the pilot project should be evaluated will depend upon

the goals of the ADR program and the needs of the agency. How, and for what purpose the pilot project is to be evaluated should be determined during the design phase. Designers need to consider such things as:

- the goals of the evaluation;
- the intended audience for the evaluation;
- the factors defining "success";
- evaluating process vs. evaluating outcomes;
- how data will be collected;
- who will conduct the evaluation;
- what resources will be necessary; and
- how the evaluation will be used.

Questions that might be asked during the evaluation include:

- What were the agency's goals for the ADR pilot project?
- Did the pilot project achieve what it set out to achieve?
- What were the benefits of the pilot project (for the agency, private parties, etc.)?
- What were the pilot project's drawbacks?
- How do the pilot project participants assess the pilot?
- What are the lessons to be learned from the pilot project?
- How can the pilot project be improved upon?

There may be different advantages in conducting an independent, outside evaluation, versus an internal evaluation. For example, an outside evaluation may provide greater credibility. On the other hand, an internal evaluation is generally less expensive. In addition,

an internal evaluation may allow more flexibility in revising and improving the evaluation methodology.

E. Prepare and Educate Participants

Pilot project participants need to be prepared appropriately. If agency personnel are to select cases for the pilot, they should have a working knowledge of ADR principles as well as an understanding of the selection criteria. Neutrals should have adequate ADR skills training and an understanding of the agency's applicable ADR practice and procedures. Disputing parties and their counsel should understand the pilot program procedures, including the ADR process, the role of the neutral, parties' rights, and confidentiality.

F. Forms

Using standardized forms will reduce the uncertainty in an ADR program and will provide consistent data for evaluation purposes. The pilot project designer should consider what forms will be needed and determine who should be responsible for drafting them. These forms can include:

- an intake or initial contact form;
- mediation offer letter;
- mediation acceptance letter;
- agreement to mediate;
- neutral engagement form;
- settlement form;
- disputant process evaluation/feedback form; and
- mediator evaluation/feedback form.

G. Neutrals

The pilot project design must provide for the selection of appropriate neutrals. Neutrals can be in-house or from outside the agency. If in-house neutrals are being contemplated, it is important to consider whether they can be "neutral," both in actuality and perception. In-house neutrals can be less expensive than private contractors, but may carry the label of being the "agency's person." If the decision is made to use in-house neutrals, care should be taken in selecting individuals that are likely to be perceived as neutral. Another option may be to use neutrals from another government agency. The

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Department of Health and Human Services coordinates a sharing neutrals program that is especially well suited to providing neutrals for workplace disputes. Consideration should also be given to the neutral's training.

H. Paying the Neutral

If the neutral is to be paid for services rendered, the pilot project design must address who will pay. If the agency pays the fee, there may be a perception by private parties that the "neutral" is tainted. On the other hand, a "free" service may be an incentive for a party to try ADR, or it may be an invitation to use ADR for delay. Having both or all parties pay for the neutral's services may be an incentive for more serious participation in the ADR sessions.

I. Incentives

To encourage maximum participation in the pilot project, designers might consider offering incentives. For example, agency employees who submit cases to ADR could be acknowledged in their performance appraisals, or bonuses could be offered to employees resolving the most cases using ADR. Another important consideration in developing incentives is to ascertain that there are no hidden institutional constraints to using ADR. For example, if litigation resources are allocated according to the number of open cases, there is little incentive to close or resolve cases expeditiously.

J. Completion of ADR

If ADR resolves the dispute, the resolution should be documented in an agreement or a decision. If the dispute is not resolved, provision should be made for returning the case to the existing dispute resolution system, or, if it is an option, sending the case to the next ADR process.

K. Information Exchange

In some ADR proceedings an information exchange (e.g., exchange of documents) may be appropriate so that the parties can better understand the strengths and weaknesses of their case and their opponent's case. The designer may choose to have model information exchange procedures for any pilot project case, or the information exchange may be handled on a case by case basis.

L. Marketing the Pilot Project

Marketing the pilot project can serve a number of purposes. An agency may wish to inform potential participants of the pilot project's existence. It also may want to publicize the fact that the agency is attempting to implement customer-friendly dispute resolution processes. The agency head or other highly placed officials might issue an internal memorandum explaining and supporting the pilot project, or convene forums to discuss the pilot project with interested individuals. Publication in the Federal Register or press releases

could inform interested individuals and entities outside the agency (See *Manual, Part II, Chapter 4, Garnering Support for ADR* for more specific information on marketing an ADR Program).

Pilot Checklist

Pre-design issues

- ✓ Characteristics of responsible individuals within the agency
 - ADR experience
 - Familiarity with design
 - Familiarity with the subject
 - Good relations with participants in the pilot project
- ✓ Identify experience and expertise within and outside the agency through:
 - Agencies that have used ADR
 - Interagency ADR Working Group Section leaders and members
 - Interagency ADR Working Group website
 - Agencies and organizations that provide training or services
 - Your agency's dispute Resolution specialist
 - Your agency's training office
 - Private ADR consultants
 - ADR professional organizations and journals
- ✓ Active participation of a diverse group of stakeholders is necessary to:
 - Reduce resistance to the pilot
 - Identify aspects that need improvement
 - Offer feedback from different perspectives
 - Provide "lessons learned" from the beginning of the pilot project
 - Identify possible sources of resistance
 - Market the pilot project to peers

Steps in Designing a Pilot Project

- ✓ Clearly identify goals
- ✓ Assess existing dispute resolution systems
- ✓ Define a successful pilot project
- ✓ Select a pilot project that is likely to succeed
- ✓ Select a pilot project central to the agency mission
- ✓ Choose an appropriate ADR method
- ✓ Review the relevant statutes and regulations

Designing a Pilot Project

- ✓ Seek assistance from those who have designed pilot projects before
- ✓ Offer ADR early
- ✓ Develop criteria for selecting cases for the pilot project
- ✓ Develop a comprehensive evaluation plan
- ✓ Prepare and educate participants
- ✓ Use standardized forms to reduce uncertainty and provide consistent data
- ✓ Provide for the selection of appropriate neutrals
- ✓ Resolve issues concerning the payment of the neutral
- ✓ Consider offering incentives to encourage maximum participation
- ✓ If a resolution is reached, document it in an agreement or decision
- ✓ Plan for possible exchange of documents
- ✓ Market the pilot